Filed 5/14/03 In re Tierra W. CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re TIERRA W., a Person Coming Under the Juvenile Court Law.	
CHERYL W., Plaintiff and Appellant, v. ALAMEDA COUNTY SOCIAL SERVICES AGENCY, Defendant and Respondent.	A099389 (Alameda County Super. Ct. No. J180326)

I. INTRODUCTION

Tierra W. is a fifteen-year-old dependent of the juvenile court. After conducting a hearing pursuant to Welfare and Institutions Code section 366.26,[1] the court adopted a permanent plan for Tierra which included appointment of a paternal aunt as Tierra's guardian and an order granting Tierra's mother, Cheryl W., reasonable visitation. Cheryl appeals from the order on the ground that the juvenile court erred by delegating control

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise noted.

over visits between her and her daughter to Tierra's guardian. We agree and, therefore, reverse the juvenile court order.

II. STATEMENT OF FACTS

A. *Proceedings Prior to the Section 366.26 Hearing*

A detailed account of the facts leading to Tierra's dependency and the procedural history of this case prior to the section 366.26 hearing is set forth in this court's opinion in *In re Tierra W.* (May 29, 2002, A098079) [nonpub. opn.] (*Tierra I*.) In *Tierra I*, this court denied Cheryl's petition for an extraordinary writ challenging an order scheduling the section 366.26 hearing in this case. We take judicial notice of *Tierra I* and briefly summarize here the factual and procedural history we set forth in that prior opinion.

When Tierra was born, Cheryl had a substance abuse problem. Therefore, Cheryl voluntarily placed Tierra with her mother, Carolyn G. Although Carolyn was never given formal legal custody of Tierra, Tierra lived with her grandmother until she was thirteen, when the events leading to this dependency case occurred. On August 3, 2000, Tierra was admitted to Alta Bates Hospital after she threatened to commit suicide. Tierra reported that, several months earlier, she ingested an unknown quantity of pills from the medicine cabinet. She also reported trying to kill herself by banging her head against walls and cutting her arms. Tierra had not received any medical or psychiatric evaluation or treatment until her August 2000 admission to Alta Bates. There was evidence Carolyn failed or refused to acknowledge the problems Tierra was experiencing and that she may have exacerbated those problems. After Tierra was released from the hospital, she was placed in the home of her paternal aunt, Thelma W.

Meanwhile, on August 11, 2000, the Alameda County Social Services Agency (the Agency) filed a petition under section 300, subdivisions (b) and (g). The petition alleged, under section 300, subdivision (b), that Tierra's "parent, or legal guardian," by which the Agency apparently meant Carolyn, failed to adequately supervise or protect her and described Tierra's suicide attempts and her admission to the hospital. The petition also alleged, under section 300, subdivision (g), that the ability of the parents, Cheryl and Michael W., to provide, protect and care for the minor is unknown. After the juvenile

court assumed jurisdiction over Tierra, it approved a case plan for Cheryl which required that she stay free from illegal drugs, comply with all drug tests, be nurturing and supportive in her visits with Tierra, and obtain and maintain a stable and suitable residence for herself and Tierra. At the six and twelve-month review hearings, the court continued Tierra's out of home placement, found that Cheryl had been provided with reasonable reunification services and that the Agency had complied with the case plan.

Cheryl failed to appear at the contested eighteen-month hearing held on February 15, 2002. Based on the social worker's report, which concluded that Cheryl had not yet completed a parenting class, had failed to consistently drug test and participate in individual therapy and had yet to "develop a relationship with the minor," the trial court found that Tierra's return to her mother would be detrimental and that reasonable reunification services had been provided or offered. The court terminated these services and scheduled a hearing to adopt a permanent plan for Tierra pursuant to section 366.26. As noted above, this court affirmed the juvenile court's rulings by denying Cheryl's writ petition on the merits.

B. ***The Section 366.26 Hearing***

On May 29, 2002, the Agency filed a report in anticipation of the section 366.26 hearing. It recommended that Thelma W. be made Tierra's legal guardian. Tierra had been living with Thelma since August 14, 2000. The Agency reported that Tierra liked living with Thelma so long as she was permitted to have regular visits with her grandmother, Carolyn. Apparently, Thelma had halted visits with Carolyn for an unspecified period after Tierra was assaulted by a cousin who lived in Carolyn's home. Despite that occurrence, Tierra wanted her visits with Carolyn to continue. According to the Agency, Tierra had no desire to have visits with Cheryl. However, Tierra would occasionally see Cheryl during overnight visits to Carolyn's home.

The Agency advised that adoption was not an appropriate option because Tierra was over the age of twelve and objected to the termination of parental rights. Further Thelma was unable or unwilling to adopt Tierra although she was willing to become her legal guardian. The Agency reported that Thelma had demonstrated she could meet

Tiara's basic needs and that Tiara was comfortable in Thelma' home and was doing well there. The Agency advised that it would be detrimental to Tierra if she was removed from that placement. The Agency proposed that, after Thelma was made legal guardian, future visitation be arranged by Thelma.

A contested section 366.26 hearing commenced on June 21, 2002. Cheryl opposed the Agency recommendation that Thelma be appointed as Tierra's guardian on two grounds: (1) The Agency did not make reasonable efforts to return Tierra to her home because Cheryl's service plan never provided for regularly-scheduled visitation or for joint therapy for Cheryl and Tierra; and (2) Thelma was not a fit guardian.

The court precluded Cheryl from offering evidence regarding the reasonableness of the reunification services the Agency had afforded to her. However, the court permitted Cheryl to testify as to her reasons for opposing the proposal to appoint Thelma as Tierra's guardian. Cheryl questioned Thelma's commitment to Tierra by pointing out that Thelma and that side of Tierra's family had not played any role in the girl's life until Tierra was removed from Carolyn's care. Cheryl also testified that Thelma was not an adequate caregiver. Cheryl attended a party at Thelma's home while Tierra was staying there. During the party, Thelma was under the influence of alcohol, other guests smoked marijuana and the refrigerator was empty. Cheryl testified that she had visited the home on other occasions when Thelma and her guests were drunk. Cheryl also testified that the father of Thelma's children had violent altercations with Thelma and her boyfriend. In addition, Cheryl believed that Thelma did not use Tierra's support money to provide for Tierra's needs. Cheryl based this conclusion on the fact that Tierra asked others for money for bus fare, hair appointments and other basic needs. Cheryl testified that she reported her observations and concerns about Thelma to the Agency worker several times but never got a response back.

The Agency called Tina Shpegal as a rebuttal witness. Shpegal is the child welfare worker who has handled this case for the past two years. Shpegal testified that Cheryl never complained to her about any of the matters Cheryl testified about in court that day. On cross-examination, Shpegal testified that during the prior six months she

had spoken with Cheryl "maybe" once on the telephone and once or twice in person. Shpegal testified that Cheryl had complained about Tierra not having certain clothes to wear but never complained about drinking or drug use at Thelma's house. Shpegal never personally observed any signs of drug use or excessive alcohol consumption. She never asked Tierra about these issues.

Cheryl's position was that the Agency's proposal to appoint Thelma as Tierra's guardian was based on its determination that Thelma was morally superior to her and would be a superior care giver. Cheryl disputed that determination and opposed the Agency's recommendation. In urging the court to adopt the Agency recommendation, Agency counsel made the following statement: "I would hope that if the Court follows the Agency's recommendation, which the Agency strongly and respectfully urges the Court to do, that there can be a time of healing afterwards insofar as the visits can go smoothly. The Agency is recommending reasonable visitation, and I would hope that that occur smoothly for the sake of Tierra as well as everybody else involved in this situation."

The juvenile court found that legal guardianship was in the best interest of Tierra and the appropriate permanent plan. It appointed Thelma legal guardian and found the placement with her necessary and appropriate. The court also found by clear and convincing evidence that Tierra was adoptable but concluded that termination of parental rights would be detrimental because Tierra was 15 years old and objected to termination of parental rights. The court also stated at the hearing that "[v]isitation between the child and the parent shall be reasonable and between the grandparents also" and "[t]hat will be determined by the legal guardian." These finding were reflected in a written order filed June 24, 2002 (the June 24 order). The June 24 order contains the following handwritten directive: "Visitation between the child, her mother and grandmother shall be reasonable as arranged by the legal guardian."

III. DISCUSSION

Cheryl argues the June 24 order must be reversed because it improperly confers upon Thelma complete discretion to determine whether or not Cheryl will visit Tierra.

The Agency contends that Cheryl waived her objection to the visitation order by failing to object to it in the juvenile court. We decline to apply the waiver doctrine for several reasons. First, the question whether control of visitation can be delegated to a guardian is primarily a legal one. (Cf., *People v. Williams* (1999) 77 Cal.App.4th 436, 460.) Second, this appeal pertains to an issue of public interest and public policy. (Cf., *In re Santos Y.* (2001) 92 Cal.App.4th 1274, 1303, fn. 15.) And, finally, at the section 366.26 hearing, Cheryl did complain that she had been denied the right to regularly scheduled visitation throughout these dependency proceedings. The juvenile court granted the Agency's motion in limine to preclude any evidence supportive of this claim. Although the court's ruling was sound, since *Tierra I* affirmed the order terminating reunification services to Cheryl, it could reasonably have been interpreted as rendering futile any further objection regarding the nature and scope of Cheryl's visitation rights. (Cf., *People v. Welch* (1993) 5 Cal.4th 228, 237.) In any event, we interpret Cheryl's objection to the Agency's failure to provide her visitation throughout this proceeding as adequately preserving the present issue for appellate review.

Cheryl relies on *In re Randalynne G.* (2002) 97 Cal.App.4th 1156 (*Randalynne G.*). In that case, the juvenile court selected guardianship as a permanent plan for a dependent child and ordered, among other things, that "'[v]isitation between the child and mother and father shall be as directed by the legal guardian in this case.'" (*Id.* at p. 1163.) On appeal, the minor's parents argued the visitation order was improper because it permitted the guardian to determine their right to visitation. The *Randalynne G.* court set forth the following guiding principles: When a guardianship is established, section 366.26, subdivision (c)(4) (section 366.26(c)(4)) requires the court to make an order for visitation with the parents unless it finds that visitation would be detrimental to the physical or emotional well-being of the child. [2] Once the court has determined that

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[2] That section states: "If the court finds that adoption of the child or termination of parental rights is not in the best interest of the child, . . . the court shall either order that the present caretakers or other appropriate persons shall become legal guardians of the child or order that the child remain in long-term foster care. Legal guardianship shall be

visitation will occur, it may properly delegate to the Agency the responsibility to manage the details of visitation. (*Id*. at pp. 1664-1667.) However, a court "may not delegate its discretion to determine whether any visitation will occur . . ." (*Id*. at p. 1664.)

Applying these principles, the *Randalynne G.* court concluded that the juvenile court erred by failing to adequately determine and define the parents' visitation right. (*Randalynne G., supra,* 97 Cal.App.4th. at p. 1166.) As the court explained, the juvenile court's obligation to "define the rights of the parties to visitation . . . necessarily involves a balancing of the interests of the parent in visitation with the best interests of the child. In balancing these interests, the court in the exercise of judicial discretion should determine whether there should be any right to visitation and, if so, the frequency and length of visitation." (*Id*. at pp. 1165-1166.) The court also found that, even if the visitation order had adequately defined the parents' visitation right, the delegation to the guardian was improper. As the court noted, "delegations to private persons to control visitation have not generally been upheld because such persons are not as accountable to the court as a child protective services agency." (*Id.* at p. 1166.) In fact, the court was unable to find any authority for allowing a guardian to control visitation. Further, the court found such a delegation was particularly inappropriate in a case such as the one before it in which there was evidence that the parents and guardian had a "fractious relationship." As the court explained, "[a]llowing the guardian to control visitation was putting control of visitation in the hands of a person in an adversary position to the

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considered before long-term foster care, if it is in the best interests of the child and if a suitable guardian can be found. When the child is living with a relative or a foster parent who is willing and capable of providing a stable and permanent environment, but not willing to become a legal guardian, the child shall not be removed from the home if the court finds the removal would be seriously detrimental to the emotional well-being of the child because the child has substantial psychological ties to the relative caretaker or foster parents. The court shall also make an order for visitation with the parents or guardians unless the court finds by a preponderance of the evidence that the visitation would be detrimental to the physical or emotional well-being of the child." (§ 366.26(c)(4).)

parents: '[I]t certainly would be improper to permit an adversary to adjudicate the rights of a parent [citation], . . .' [Citation.]" (*Id*. at p. 1170.)

Randalynne G. supports Cheryl's contention that the visitation order in this case was improper. Although the juvenile court concluded that Cheryl was entitled to reasonable visitation, its order delegated so much control over visitation to the guardian that Thelma essentially had the to power to preclude visitation altogether. Further, even a more restrictive delegation to Thelma would have been improper since (1) a guardian is a private party who is not in any way analogous to the Agency; and (2) this particular guardian has a fractious relationship with Cheryl and thus should not be in the position to adjudicate Cheryl's rights.

The Agency argues *Randalynne G*. should not be followed in this case for several reasons. First, the Agency argues the present case is distinguishable because, here, Tierra does not want to visit with Cheryl. As a factual matter, this contention disturbs us. In *Tierra I*, we expressed our concern with the Agency's lax handling of the jurisdictional aspects of this case. We are equally troubled that the Agency has consistently viewed and treated this mother as a peripheral participant in these proceedings. The Agency's alleged failure to facilitate visitation between mother and daughter is not an issue that has been properly preserved for our review. However, we are not pleased by the absence of evidence in this record of any meaningful effort to address the problems which keep Tierra and Cheryl apart. Though evidence regarding the nature of those problems is scant, the very fact that Tierra opposed the termination of Cheryl's parental rights undermines the Agency's superficial assertion that Tierra does not want to visit her mother. In any event, the minor's desire to visit or not visit has no bearing on the *Randalynne G*. court's legal analysis or the soundness of its holding regarding the impropriety of delegating control over visitation to a guardian.

The Agency also suggests this case is distinguishable from *Randalynne G.* because the juvenile court in this case specifically found that Cheryl was entitled to reasonable visitation. In this regard, the Agency underscores that "[s]uch matters as time, place and manner of visitation do not affect the defined right of a parent to see his or her child and

thus do not infringe upon the judicial function." (Quoting *In re Jennifer G.* (1990) 221 Cal.App.3d, 752, 757 (*Jennifer G.*).) But the *Jennifer G.* court also found that a court's obligation to define the rights of the parties to visitation requires it to determine not only whether there should be visitation but, if so, "the frequency and length of visitation." (*Id.* at p. 757.)

We acknowledge there is some disagreement among the courts as to how many administrative details can be properly delegated *to the Agency*. (See, e.g., *In re Moriah T.* (1994) 23 Cal.App.4th 1367 [disagreeing with *Jennifer G.* requirement that court specify frequency and length of visit].) However, that dispute is irrelevant here. The challenged order fails to ensure that Cheryl will receive the reasonable visitation to which the court expressly found she is legally entitled or indeed any visitation at all because all control over visitation was delegated to a third party.

The Agency also contends that *Randalynne G.* was wrongly decided to the extent it precludes the guardian from determining what amount and type of visits by a parent are reasonable. The Agency cites no authority to support its argument that the guardian is in the best position to determine what is best for the minor. Permitting a guardian to act as an administrator of a court order raises serious constitutional concerns because the guardian is not a representative of the state subject to the supervision or control of the juvenile court. (See *In re Julie M.* (1999) 69 Cal.App.4th 41, 49; *In re Danielle W.* (1989) 207 Cal.App.3d 1227, 1237-1238.) Further, in this case, the delegation was particularly improper because of the unfriendly if not hostile relationship between Thelma and Cheryl.[3]

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[3] After all the appellate briefs were filed in this case, a panel of the Sixth Appellate District filed its opinion in *In re Jarred H.* (May 9, 2003, H025258) 2003 C.D.O.S. 3923 (*Jarred H.*) *Jarred H.* approved a visitation order that gave a legal guardian discretion to determine the time, place and manner of visits. That case is distinguishable from the present case and *Randalynne G.* on the ground that the guardian in *Jarred H.* was not an adversary of the mother. In any event, we respectfully disagree with *Jarred H.* to the extent it approves of delegating control over visitation to a guardian.

Finally, the Agency argues that the *Randalynne G.* court misconstrued section 366.26(c)(4) (see footnote 2, *ante*) by interpreting it as requiring the juvenile court to make a visitation order when selecting guardianship as a long-term plan. The Agency contends such an order is required only when the permanent plan is long-term foster care. (Citing *In re Jasmine P*. (2001) 91 Cal.App.4th 617, 621.) Therefore, the Agency reasons, since the juvenile court was not even required to make a visitation order at all, any error as to the scope of that order is harmless. If we were required to choose, we would likely follow *Randalynne G*., because its interpretation of rule 366.26(c)(4) is reasonable and persuasive. However, we need not make that determination here. Whether or not it was required to, the juvenile court in this case expressly found that Cheryl was entitled to reasonable visitation. In light of that finding, the court erred by dsdelegating complete control over visitation to the guardian.

IV. DISPOSITION

The June 24 order is reversed and this case is remanded to the trial court for further proceedings consistent with our decision.

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Haerle, Acting P.J.

We concur:

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Lambden, J.

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Ruvolo, J.